

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 11/02/16; Decision Issued: 11/03/16; Agency: DMAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10867; Outcome: No Relief – Agency Upheld;
Administrative Review: EDR Ruling Request received 11/14/16; EDR Ruling No. 2017-4447 issued 12/08/16; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10867

Hearing Date: November 2, 2016
Decision Issued: November 3, 2016

PROCEDURAL HISTORY

On August 3, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On August 15, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 6, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 2016, a hearing was held at the Agency's office. Grievant was notified of the hearing time and location. He did not appear at the hearing.

One day prior to the hearing, Grievant sent an email to EDR alleging he had not received the Agency's proposed exhibits. The Agency presented a picture showing the exhibit book had been delivered Grievant's address.

APPEARANCES

Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Medical Assistance Services employed Grievant as a Policy and Planning Specialist. Grievant had prior active disciplinary action. On October 13, 2015, he received a Group II Written Notice with a five workday suspension for sleeping during work hours.

On July 26, 2016 at 9:47 a.m., Grievant was in his office seated in front of his desk. He was not taking a scheduled break from work. His head was slumped forward with his face positioned downward. His eyes were closed. He was snoring and/or sleep-breathing. Grievant was asleep. He remained asleep for at least 7 or 8 minutes. He did not change positions or move during that time. Grievant did not notice that the Supervisor entered his office, stood two feet from him, and bent over to see that Grievant's eyes were closed and hear that Grievant was snoring. Grievant did not notice that a Division Director took two pictures of him sleeping.

The Division Director notified the Deputy Director that she had observed Grievant sleeping. The Deputy Director entered Grievant's office and positioned himself in front of Grievant to look at his eyes and hear Grievant snoring. After several moments, the Deputy Director rapped on Grievant's desk and Grievant awoke. The Deputy Director told the Grievant that he appeared to be sleeping. Grievant grabbed a bottle on his desk and said he was drinking, not sleeping. Grievant was not drinking, he was asleep.

Grievant claimed he was checking a computer cord under his desk. Grievant was not checking a computer cord under his desk.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[S]leeping during work hours” is a Group III offense. On July 26, 2016, Grievant was in his office, seated in front of his desk. He was slouched forward with his head down and eyes closed. He was snoring and asleep. He remained asleep for at least 7 or 8 minutes. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant claimed he was not sleeping. The evidence is clear that on July 26, 2016, Grievant was asleep at his desk during work hours. He was observed asleep by five employees. Several of these employees entered Grievant’s office, bent over to see if Grievant’s eyes were closed, and confirmed that Grievant’s eyes were closed and he was snoring.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”² Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Va. Code § 2.2-3005.

Grievant alleged the Agency acted out of a “pure racial conspiracy and discrimination.” No credible evidence was presented to support this allegation. The evidence is overwhelming that Grievant was disciplined because he was asleep and for no other reason.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer’s **decision becomes final** when the 15-

calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.